Mailed: August 31, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Backflow Prevention Device Inspections, Inc.

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Serial No. 76016339
Serial No. 76016340
Serial No. 76016341

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Stephen R. Winkelman of Fennemore Craig for Backflow Prevention Device Inspections, Inc.

Eugenia K. Martin, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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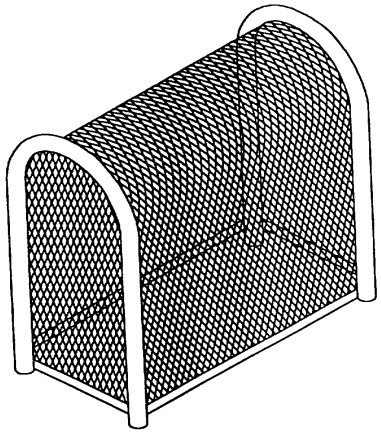
Before Quinn, Bottorff and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

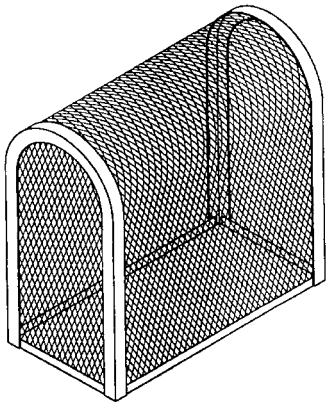
Applicant, Backflow Prevention Device Inspections, Inc., has filed applications to register the following marks for goods identified as "enclosures for protection of backflow assemblies, namely, a metal cage placed over backflow assemblies" in Class 6. Each application contains a description of the mark as indicated below.

Serial No. 76016339[1]



The mark consists of a configuration of an enclosure with no sharp corners for the protection of backflow assemblies consisting of a rounded pipe on each end bent in a radius with expanded metal covering the open spaces within the radius and between the rounded pipes.

Serial No. 76016340[2]



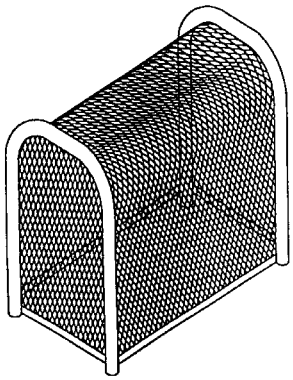
The mark consists of a configuration of an enclosure with no sharp corners for the protection of backflow assemblies consisting of rounded angle iron on each end bent in a

[1] Filed April 3, 2000, asserting a date of first use on December 14, 1992 and first use in commerce on September 15, 1993.

[2] Filed April 3, 2000, based on an assertion of a bona fide intent to use the mark in commerce.

radius with expanded metal covering the open spaces within the radius and between the rounded angle iron.

Serial No. 76016341[3]



The mark consists of a configuration of an enclosure with no sharp corners for the protection of backflow assemblies consisting of a rounded pipe on each end utilizing two radiuses with expanded metal covering the open spaces within the radiuses and between the rounded pipes.

The examining attorney refused registration as to each application on the grounds that the product design is functional under Section 2(e)(5) of the Trademark Act and that, if the product design is not functional, it is a product design that does not function as a mark under Sections 1, 2, and 45 of the Trademark Act and has not acquired distinctiveness under Section 2(f) of the Act.[4]

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[3] Filed April 3, 2000, asserting a date of first use on December 14, 1992 and first use in commerce on September 15, 1993. This design is referred to in applicant's specimens as a "bench" model enclosure.

[4] We note that neither the examining attorney nor the applicant raised an issue as to whether the Section 2(e)(5) refusal or the alternative Section 2(f) refusal was premature with respect to the product design

When the refusals were made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

These cases were consolidated by the Board, at applicant's request, on November 25, 2003.

We turn first to the question of whether applicant's product designs are functional.

Applicant describes the nature of backflow assembly devices and the purpose of enclosures for those devices as follows (Brief, p. 1):

> "Backflow assemblies are devices that are used to stop the backflow of substances through pipes in to [sic] the public potable (drinking) water supply. The devices usually stick up out of the ground. To prevent damage to the devices *and* to those who might accidentally run into them, the backflow devices are often enclosed."

In arguing that the designs of applicant's backflow assembly enclosures are functional, the examining attorney points to applicant's advertisements which, according to the examining attorney, show that the product designs are safer because they lack sharp edges and corners, and stronger because of the overall design of the covers. The examining attorney contends that although strength and safety may be features of all backflow

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in the intent-to-use application and, moreover, they have both argued the refusals on the merits. Under the circumstances, we will decide the issues as they relate to the intent-to-use application on the merits and accord the evidence thereon whatever probative value it may have.

assembly covers, the applicant's designs claim to improve upon these features and are therefore more desirable and functional.

Applicant, on the other hand, maintains that the configurations are only de facto functional for safety, installation and strength, rather than de jure functional because, in applicant's view, such characteristics have to do with the nature of all backflow assembly covers, not applicant's particular design. Applicant argues that neither the expanded metal covering nor the round pipe or angle iron bent in a radius is "essential to the use or purpose of" a backflow prevention device cover and that many feasible alternative designs in other various shapes and using a variety of materials are available that perform the same function. Applicant further argues that the design does not give the product a competitive advantage on cost and that, in fact, applicant's designs make them more expensive to produce. It is applicant's contention that if there had been a cost advantage, competitors would have adopted the less costly designs over the last 10 years.

In support of its position that the marks are not functional, applicant has submitted the unverified statement of its president, Jeff Keim, accompanied by examples of applicant's print and website advertisements as well as examples of advertisements for backflow assembly covers made by others. Applicant has also submitted the unverified statements of a

"specifier" of backflow assembly covers, three purchasers of backflow assembly covers, four representatives, each of whom represents various manufacturers in the irrigation industry, and three distributors of backflow assembly covers.[5]

A product feature is functional and cannot serve as a trademark if the feature is essential to the use or purpose of the article or if it affects the cost or quality of the article. TrafFix Devices Inc. v. Marketing Displays Inc., 532 U.S. 23, 58 USPQ2d 1001, 1006 (2001) quoting Qualitex Co. v. Jacobson Products Co, 514 U.S. 159, 34 USPQ2d 1161 (1995).

The Court in In re Morton-Norwich Products, Inc., 671 F.2d 1332, 213 USPQ 9 (CCPA 1982), set forth four factors to be considered in determining whether a product design is functional:

> (1) the existence of a utility patent that discloses the utilitarian advantages of the design;
>
> (2) the touting by the originator of the design in advertising material of the utilitarian advantages of the design;
>
> (3) facts showing the unavailability to competitors of alternative designs; and
>
> (4) facts indicating that the design results from a relatively simple or cheap method of manufacturing the product.

[5] Contrary to applicant's claim, none of the statements relied on by applicant to support its position, including Mr. Keim's statement, is a "sworn declaration" or for that matter, verified at all. The statements do not qualify as declarations under 37 CFR 2.20, and they are not sworn, as they are neither witnessed and notarized, nor executed "under penalty of perjury" pursuant to 28 USC §1746.

As to the first factor, the mark is not the subject of a utility patent. Therefore this factor does not weigh in our decision.

As to the second factor, applicant's advertisements, stating that these units "are often used to cover dangerous, hard-to-see pedestrian trip hazards," make it clear that pedestrian safety is an important function of its enclosures. It is equally clear from the advertisements that the special "no sharp corners," "rounded pipe" and "rounded angle iron" features of applicant's particular designs are critical to this function.

The following statements in applicant's various advertisements draw specific attention to this functional advantage of applicant's designs:

> "This unique enclosure is perfect for schools, parks or anywhere people can come into physical contact with a backflow assembly enclosure, since all the sharp corners and edges of the typical angle iron enclosure have been eliminated."
>
> "No sharp corners or jagged edges"
>
> "Never any sharp corners or edges so it's perfect for schools, parks, and other meeting places where people come into close contact with a backflow assembly. ... All Coast GuardShack™ (CGS) enclosures are constructed of 304 stainless steel, sandblasted to remove all of the sharp edges and burrs typically found on stainless steel expanded metal."
>
> "Never any sharp corners or edges..."
>
> "Entire unit sandblasted to remove all sharp edges and burrs typically found on SS expanded metal"

> "ClockGuard™, with its clean, no-nonsense lines and rounded corners for pedestrian safety, is available in 2 sizes..." [6]

Whether or not safety features are inherent in "the nature of all backflow assembly covers" is not relevant. While other designs might be safe, applicant's designs are apparently safer, and they are explicitly promoted that way. The advertisements directly attribute the safety of applicant's products to the claimed "no sharp corners," "rounded pipe bent in a radius" and "rounded angle iron bent in a radius" features of applicant's designs. The clear import of applicant's advertising is that the typical designs in the industry, that is, sharp, square-edged angle iron cages, are less safe.[7]

Thus, the advertisements make it clear that the features of applicant's designs are essential to the purpose of its products. Accordingly, this factor weighs strongly in favor of finding that applicant's designs are functional.

[6] Applicant is not seeking registration for the design of this particular unit. However, this unit does contain features which are similar to those in the designs for which registration is sought.

[7] On the other hand, the advertisements do not show that applicant's devices are easier to install or stronger because of the particular design features sought to be registered.

As to the third factor, where, as here, a feature is found to be essential to the purpose of the device, the Supreme Court has said that there is no need to engage in speculation about the availability of alternative designs. TrafFix Devices Inc. v. Marketing Displays Inc., supra at 1006. Thus, the fact that assembly enclosures may be produced in other forms and shapes does not detract from the functional character of applicant's designs. See In re Morton-Norwich Products, Inc., citing In re Honeywell, Inc., 532 F.2d 180, 189 USPQ 343 (CCPA 1976).

That being said, even if we do consider this factor in our determination, our findings would not weigh in applicant's favor.

According to applicant's president, Mr. Keim,

> Applicant's product configuration marks are just one of many equally feasible, efficient, competitive alternative designs that are currently available on the market place for backflow assembly device covers.
>
> Our competitors include All-Spec, LeMeur, G&C Enclosures, Strong Box, Dyer Fiber Glass, Golf Stream Products, Hot Box, Safe-T-Covers, and others.

Similarly, the specifier, and the three distributors and four representatives assert,

> The backflow assembly cover industry is filled with numerous competitors that offer equally feasible, efficient and competitive alternatives to Backflow's products.

The enclosures advertised by other manufacturers appear to consist essentially of rectangular shaped solid metal covers, rectangular shaped metal covers with punched viewing ports,

rectangular shaped expanded metal enclosures, rectangular shaped insulated fiberglass enclosures, and rounded, pyramidal shaped insulated fiberglass enclosures.

Mr. Keim, at one point in his statement, delineates applicant's market as the "un-insulated, angle iron, expanded metal enclosure" market.[8] Elsewhere in his statement, however, Mr. Keim identifies its competitors as those companies who make not only expanded metal designs, but insulated and uninsulated solid metal or fiberglass enclosures as well. Assuming the relevant market is narrowly defined, then there is evidence of only a single available alternative design in applicant's market, and that is the rectangular shaped square-cornered sharp-edged design with an expanded metal cage. The existence of any alternative enclosures made of, for example, solid metal or fiberglass, would not be relevant because those designs would not be competing in applicant's market. Moreover, the one "alternative" design is obviously not an equivalent or feasible alternative as it contains the very features (squared, with sharp corners and edges) which, according to applicant, make this design less safe.

[8] Mr. Keim states, "Applicant has approximately a 20% market share for uninsulated, angle iron, expanded metal enclosure for backflow assemblies." Consistent with this assertion, applicant argues on p. 2 of its brief that applicant "has...a 20% share of its marketplace." We also note that in applicant's advertising, the cost of its designs are compared to "ordinary, square unpainted angle iron cages."

Even extending applicant's market to encompass all types of assembly enclosures, the conclusory statements by Mr. Keim and the other individuals that those designs are "equally feasible alternatives" are not persuasive. The question is not whether there are alternative designs that perform the same basic function but whether those designs work "equally well." Valu Engineering Inc. v. Rexnord Corp., 278 F.3d 1268, 61 USPQ2d 1422, 1427 (Fed. Cir. 2002). There is no claim by any of these individuals, nor any evidence, that these are equally "safe" alternatives to applicant's design. There is no explanation as to how any of these other products compare with or match applicant's product in terms of safety.[9] In fact, it appears that for the most part they do not. Most of these alternative designs consist of rectangular shaped square-cornered metal. Certainly these would not be considered equal alternatives to applicant's design.

Moreover, the views expressed by these individuals do not even necessarily represent the views of competitors in the industry as to whether applicant's design gives it a competitive advantage.

[9] Some of these other designs may include handles or other similar features for ease and safety of handling and installation, but they do not perform nor claim to perform the function of protecting the public from injury.

In any event, the availability of a few alternative, equally safe designs, if they existed, would not detract from the functionality of applicant's designs. If applicant's designs are the best, or at least one, of a few superior alternatives, it follows that competition is hindered. In re Lincoln Diagnostics Inc., 30 USPQ2d 1817 (TTAB 1994) quoting In re Bose Corp., 772 F.2d 866, 227 USPQ 1, 5-6 (Fed. Cir. 1985). Compare Morton-Norwich, supra (where "an infinite variety" of container shapes remained available to competitors).

Applicant's argument that if this design were "so essential, then competitors would have been forced to adopt them" is not well taken. If a product feature is essential to the use or purpose of the device, it is not necessary to consider whether the particular product configuration is a competitive necessity. TrafFix Devices, Inc. v. Marketing Displays Inc., supra at 1006 ("Where the design is functional...there is no need to proceed further to consider if there is a competitive necessity for the feature."). In any event, applicant claims that others have, in fact, copied applicant's designs.

Turning to the fourth factor, Mr. Keim states that applicant's product configurations are actually more expensive to produce "than those of competitors."[10] Assuming this is true,

[10] Other information in the record seems to contradict this statement. The distributors, representatives and purchasers all state that

it is not clear whether any increased cost is due to factors other than the product features sought to be registered, such as the materials used in manufacturing the products, the process used in applying the "powder-coated epoxy finish," the "tamper-proof hardware" provided, or the hinged openings for the products, none of which are claimed as part of applicant's marks. Even if we assume that the product is more costly, while a lower manufacturing cost may be indicative of the functionality of a product feature, a higher cost does not detract from the functionality of that feature. As stated in TrafFix Devices Inc. v. Marketing Displays Inc., supra at 1006, a product feature is functional "if it is essential to the use or purpose of the article or when it affects the cost or quality of the article." (Emphasis added.) Thus, even at a higher manufacturing cost, applicant would have a competitive advantage for what is touted as a superior design.

In view of the foregoing, we find that the designs are functional and are therefore not registrable.

Although we have determined that the designs are functional, for purposes of a complete record, we will decide the issue of

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"Backflow's products are not the most inexpensive or expensive covers, but fall somewhere in the middle." Also, applicant's advertising copy indicates that its designs are "Inexpensive" and "cost[] no more than most ordinary, square, unpainted angle iron cages."

whether, assuming the designs are not functional, the designs have acquired distinctiveness.

In support of its claim of acquired distinctiveness, applicant has submitted the unverified statement of Jeff Keim, applicant's president, alleging exclusive and continuous use of the design for nine years; total sales for this period exceeding $1.5 million, and for the three-year period from 1998 to 2000 an increase in sales from $200,000 in 1998 to $450,000 in 2000; expenditures of approximately $20,000 year in advertising and marketing; and a claim that applicant has a 20% market share "for un-insulated, angle iron, expanded metal" enclosures. Mr. Keim's statement is accompanied by examples of applicant's print and Internet advertising materials.

Applicant has also relied on the unverified statements from the same individuals identified earlier, namely a "specifier" of backflow assembly covers; three purchasers of backflow assembly covers; four representatives each of whom represents various manufacturers in the irrigation industry; and three distributors of backflow assembly covers.

Each individual indicates his or her familiarity with the industry and makes the following statements:

> One of the lines of backflow assembly device covers that I am familiar with is the line made by [applicant]. Covers made by Backflow have been around for years.

> Whenever I see a backflow assembly cover with no sharp corners that consists of a round pipe or angle iron on each end, bent in a radius (or double radius) with expanded metal covering the open spaces, I know I am looking at a device from Backflow.
>
> This look is very unique in the industry. No one else uses that look. ...
>
> ...
>
> Backflow has always marketed its particular "unique" design. Backflow's marketing materials have almost always emphasized the beauty and uniqueness of its look and included a picture of the product.

The statements of the specifier, the three distributors, and the four representatives also include the following assertion:

> When distributors, dealers, customers and others in the industry see this look, they know the cover is coming from one company, Backflow.

Applicant argues that its advertising through the years has almost always provided a picture of its product that emphasizes its "unique" and "beautiful" look, and that by doing so the advertising directly associates the marks with applicant as the source of the products. Applicant claims that this is as close to "look for" advertising as it can be without using the words "Look for." Brief, p. 3. According to applicant, the marketing of its "unique" look has resulted in "tremendous" success for applicant as shown by its advertising and sales figures, the fact that applicant owns 20% of the market, and the "sworn declarations" of those who recognize its design as a mark.

The examining attorney contends that the evidence submitted by applicant is insufficient to establish acquired distinctiveness, asserting that applicant's form declarations are entitled to little weight and that the length of use and advertising and sales figures illustrate only the popularity of the product but not an association of the design of the product with applicant.

The examining attorney has made of record advertisements for two enclosures for "rounded edge" designs which the examining attorney claims are similar to applicant's enclosure design. One advertisement is by StrongBox and the other is from LM Nelson & Associates, Inc.

The enclosure shown in the advertisement by StrongBox contains rounded-off metal frames and is covered with what applicant refers to as a "wire mesh." The enclosure offered by LM Nelson & Associates, Inc. contains rounded aluminum frames and is covered with what applicant has described as "thermoplastic sheeting."

Applicant argues that the designs submitted by the examining attorney are not similar because neither contains "a cover that consists of a round pipe or angle iron on each end bent in a radius (or double radius) and with expanded metal covering the open spaces." Brief, p. 8. Instead, as described by applicant, "they are squared and are made using a wire mesh or solid cover

rather than expanded metal." Brief, p. 8. Applicant differentiates "the single" backflow assembly cover that is not "squared" (by StrongBox) on the basis that is enclosed by solid cover of "thermoclear sheeting" instead of expanded metal.

The burden is on applicant to show that its mark has acquired distinctiveness, and the more descriptive the term, the heavier that burden. Yamaha International Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). A design that constitutes the appearance of the product is highly descriptive of the goods. See Goodyear Tire and Rubber Co. v. Interco Tire Corp., 49 USPQ2d 1705 (TTAB 1998). Thus, applicant's burden in this case is substantial.

In making our determination, we are also mindful of the Supreme Court's caution against the "over-extension of trade dress protection" noting that "product design almost invariably serves purposes other than source identification." TrafFix at 1005 quoting Wal-Mart stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 54 USPQ2d 1065, 1066 (2000) ("...almost invariably, even the most unusual of product designs--such as a cocktail shaker shaped like a penguin--is intended not to identify the source, but to render the product itself more useful or more appealing.")

With these principles in mind, and after considering all the evidence of record, we find that applicant has failed to meet its burden.

To establish acquired distinctiveness, applicant must show, through direct and/or circumstantial evidence, that the primary significance of its product designs in the minds of relevant purchasers is not the product but the producer. See In re Ennco Display Systems Inc., 56 USPQ2d 1279 (TTAB 2000). In order to establish acquired distinctiveness based on circumstantial evidence, the evidence must be sufficient to permit an inference of wide exposure of the product designs to the relevant public and an inference that the exposure has been effective in creating distinctiveness. See In re Ennco Display Systems Inc., supra and In re Recorded Books Inc., 42 USPQ2d 1275 (TTAB 1997). That is not the case here.

To begin with, Mr. Keim's statement, including its claims regarding applicant's length of use, market share, and amount of sales and advertising, is unverified and therefore of little probative value because the assertions contained therein cannot be taken as established fact. See, e.g., In re Mehta, 347 F.2d 859, 146 USPQ 284 (CCPA 1965) and In re Grande Cheese Co., 2 USPQ2d 1447 (TTAB 1986). Even assuming the truth of these facts, we do not find them persuasive on the question of whether the designs have acquired distinctiveness.

Applicant's marketing expenditures averaging $20,000 per year do not seem remarkable, and applicant's yearly expenditures have actually decreased over the identified three-year period from $48,000 in 1998 to $31,000 in 2000. Moreover, applicant has not identified the nature of the advertisements, or provided any indication as to how, or to whom they are distributed, or the extent of their distribution. Nor has applicant indicated the length of time its products have been advertised on the Internet.

Applicant's raw sales figures do not seem particularly impressive on their face and there is no context for these figures. There is no information as to the cost per unit or how many units have been sold or the number of customers they have been sold to. Thus, there is no way of knowing whether there have been substantial sales to the relevant purchasers. The evidence regarding applicant's share of the market seems inconsistent. Mr. Keim's claim that applicant has a 20% market share is based on a narrowly defined market consisting only of "uninsulated, angle iron, expanded metal" enclosures. Obviously, by restricting its market to essentially one particular type of cover, applicant would appear to have some market power. At the same time, however, Mr. Keim has described applicant's competitors as including companies that produce covers consisting of materials other than "uninsulated, angle iron, expanded metal." We have no information as to applicant's share of this

larger market. Thus, the evidence of applicant's claimed market share is of little use in determining the extent of exposure to relevant purchasers.

The mere fact that applicant's products are pictured on its advertising materials is, in itself, no indication the depictions would be recognized as an indication of source or anything more than simply a depiction of the products.[11] See In re Pingel Enterprise inc., 46 USPQ2d 1811 (TTAB 1998). In addition, references in the advertising to the "unique" and "beautiful" "look" of the products are not drawing attention to the source of the designs but merely to the aesthetic and functional features of the designs. Moreover, "the look" applicant refers to may be attributed in part to features other than those sought to be registered such as the finish and color of the products, or the type of metal pipe used or the diamond pattern created by the expanded metal, none of which is claimed as a feature of applicant's designs.[12]

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[11] We note that although certain evidence, such as sales figures and third-party statements, specifically pertains to use of the design in the ITU application, there is a complete absence of any examples of advertising for that design. The examining attorney and applicant have treated the advertisements for the designs in the use-based applications as equally representative of the manner of use of the design in the ITU application. We decline to do so, however, and instead find that the lack of advertising for the ITU design further contributes to the insufficiency of the evidence as to this application.

[12] For example, in some advertisements, applicant's designs are compared to "ordinary, square, unpainted angle iron cages" (emphasis added).

In addition, it is not uncommon for other manufacturers in the industry to promote "the look" of their designs, not as an indication of source, but as a desirable feature of their products. For example, StrongBox advertises that the "[a]rchitectural lines of [its tube and wire] enclosure blend beautifully into the landscape environment"; LeMeur describes one of its enclosures as having "an attractive directional finish on exposed portions of [the] angle frame"; Placer Waterworks touts "good looks" as one of the "key benefits" of its design; and LM Nelson & Associates, Inc. states that its Pro-Box enclosure "blends in with the environment." None of these other companies appear to be promoting "the look" of their designs as trademarks. In fact, this evidence tends to show that the relevant customers would not generally look to the design of an assembly device enclosure to identify source. Compare Yamaha International Corp. v. Hoshino Gakki Co., supra.

In short, there is simply nothing in applicant's advertising to indicate that the design itself is promoted as a mark. We also note, in this regard, that although applicant almost always

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Other advertising copy states, "our eye catching design comes in a desert tan enamel finish. Other finishes and colors are available for your special needs"; or "Protecting your backflow assembly from vandalism was never more beautifully done than with [applicant's] GuardShack™ bench enclosure, now available in powder-coated or stainless steel models"; or "Special colors and textures available"; or "Standard colors include our High Gloss Forest Green and Woodland Tan colors."

uses the "TM" symbol in its advertisements in connection with the names of its product designs (e.g., GuardShack™ and Coast GuardShack™), the symbol is never used in connection with the design itself.

To the extent, if any, that the depictions of the designs on the advertising materials could be said to indicate source, as we mentioned earlier, applicant has provided no evidence of the amount or distribution of such materials. Thus, we cannot determine what kind of exposure, or the extent of exposure and hence impact on ultimate purchasers, these materials have had.

Applicant contends that the impact of its advertising has been shown through the statements of the eight industry personnel and three purchasers identified earlier. Not only are these uniformly worded statements unverified, but they are conclusory and unsupported and therefore substantively lacking as well.[13] First, the perceptions of a few individuals in the industry concerning acquired distinctiveness is of minimal value because they are not the ultimate customers for applicant's products. See In re Ennco Display Systems Inc., supra and In re Parkway

[13] Each of these individuals states that "[c]overs made by Backflow have been around for years." However, the mere fact that these individuals might be aware that applicant has been making covers for years does not necessarily mean that they have been familiar with the particular covers that have been in use or the marks used in connection with those covers. It is not even entirely clear whether the "line" of applicant's products with which they are familiar refers to these particular designs or some other "line" of applicant's enclosures.

Machine Corp., 51 USPQ2d 1201 (TTAB 1999). Moreover, their claims regarding customer perception are not convincing. There is no indication as to the extent of their distribution of the products (such as number of years, number of customers or number of units sold) or, for that matter, whether they ever sold applicant's products. With no supporting information, their conclusory statements that customers recognize applicant's product designs as marks are not particularly meaningful.

Thus, these statements, along with the three purchaser statements, at best, establish that only a very small number of people recognize the design as a mark. The evidence is far from sufficient to demonstrate that the relevant purchasers in general recognize it as a mark.

Further undercutting applicant's claim that the mark has acquired distinctiveness, the evidence shows that at least three companies including applicant use this overall shape for their respective enclosures. Applicant's design, while not exactly the same, is nevertheless quite similar in overall appearance to the other two company's designs and particularly to the "tube and wire" design of LM's enclosure. That design is very similar to applicant's "bench" model enclosure shown in application Serial No. 76016341. There is no evidence that any distinctions between these designs and applicant's designs, such as the use of wire mesh or plastic sheeting instead of expanded metal, would be made

on the basis of the source of the product, rather than its function.

We turn lastly to applicant's claim that its competitors have recently begun copying applicant's trade dress and that intentional copying is considered probative evidence of acquired distinctiveness. Intentional copying supports a finding of acquired distinctiveness only where the defendant intended to confuse consumers. See Thomas & Betts Corp. v. Panduit Corp., 65 F.3d 654, 36 USPQ2d 1065 (7th Cir. 1995). Here, however, there is no evidence, other than Mr. Keim's unverified, unsupported claim, that the alleged copying was intentional. Moreover, there is no evidence that any such copying, if intentional, was due to an intent to confuse customers as to the source of the products rather than to the functional advantages of applicant's products. See Thomas & Betts Corp. v. Panduit Corp., supra.

In view of the foregoing, we find that the evidence submitted by applicant, considered in its entirety, is insufficient to establish that its product designs have acquired distinctiveness.

Decision: The refusal to register is affirmed on the ground that the product designs are functional, and even if they were not functional, they do not function as marks.